A decade and a half of deference (part 2)*

PJH MAREE**
GEO QUINOT***

3 *The theory of deference*

3.1 The Canadian connection

Hoexter and O'Regan J[95] established deference as a prominent topic and principle, respectively. In doing so, both Hoexter and O'Regan J drew on Dyzenhaus's conception of "deference as respect".[96] His conception of deference as respect follows from an attempt to respond to the following questions: "How should judges in common law jurisdictions respond to administrative determinations of the law? Should they defer to such determinations or evaluate them in accordance with their sense of what the right determination should have been?"[97]

Significantly, he points out that these questions are interwoven with political and legal theory.[98] Therefore, deference in itself cannot necessarily provide guidance; deference is a function of political and legal theory and their content needs to be articulated before the meaning or viability of deference can even be assessed. For example, the question of the constitutional roles for the judiciary and the administration requires elaboration before one could determine what an appropriate degree of judicial scrutiny might be or whether a dispute is justiciable.

Dyzenhaus is critical of formalistic arguments for the justification of judicial review, such as the *ultra vires* or common-law justifications,[99] because they do not assist courts in resolving administrative-law disputes and they do not recognise the legitimate place of the public administration in the legal order.[100] Thus, Dyzenhaus's point of departure is that "the justification of review and guidance on how such review should proceed can only be found in a political theory of the rule of law".[101]

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** Postdoctoral Fellow, Department of Public Law, Stellenbosch University.
*** Professor, Department of Public Law, Stellenbosch University.

95 the *Bato Star* case (n 4).

96 Hoexter refers to Dyzenhaus in her seminal article on deference (Hoexter (n 22) 151 n 245) and O'Regan J in preferring the word "respect" to "deference" (*Bato Star* case (n 4) par 46 n 32).

97 Dyzenhaus "The politics of deference: judicial review and democracy" in Taggart (ed) *The Province of Administrative Law* (1997) 279. One should note that these questions are of limited relevance in South Africa, since it is not a pure common-law system.

98 Dyzenhaus (n 97) 279.

99 For a critical discussion and comparison of the *ultra vires* and common law justifications for review, see Jowell "Of vires and vacuums: the constitutional context of judicial review" 1999 *Public Law* 448.

100 De Ville "Judicial deference and différance: judicial review and the perfect gift" 2006:2 *Potchefstroom Electronic Law Journal* 41 42-43.

101 De Ville (n 100) 43 (footnote omitted). He has assumed the legal and political stance of an anti-positivist and proceduralist democrat (41).

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Dyzenhaus identifies two types of judicial deference, namely "submissive deference" and "deference as respect".[102] On the one hand, submissive deference is based on the Diceyan model of law and "what it requires of judges is that they submit to the intention of the legislature, on a positivist understanding of intention".[103] On the other hand, "[d]eference as respect requires not submission but a *respectful attention to the reasons offered or which could be offered in support of a decision*, whether that decision be the statutory decision of the legislature, a judgment of another court, or the decision of an administrative agency".[104] Furthermore:

> "Deference as respect ... provides an ideal which can inform an attempt to rearticulate the relationships between the legislature, the courts and the administration in such a way that the courts retain a legitimate role as the ultimate authority on the interpretation of law.
>
> In statutory interpretation, this ideal requires of judges that they determine the intention of the statute, not in accordance with the idea that there is some prior (positivistic) fact of the matter, but in terms of the reasons that best justify having that statute."[105]

Dyzenhaus explains that this involves judges setting out the best reasoning that resulted in the final statute and, where the meaning of legislation is contested, this process will contribute to giving meaning to the legislative provisions.[106] Thus,

> "[w]hen the statute is one that sets up a regulatory regime and a tribunal to decide disputes that may arise out of the regime, this interpretative approach requires judges to take the tribunal's decision seriously ... because what they are primarily concerned to do is to find the reasons that best justify any decision, whether legislative, administrative or judicial. And, if the court has before it not only a statute to interpret, but also a tribunal's interpretation of that statute, then the tribunal's interpretation makes a difference to the structure of the interpretative context."[107]

Reasons for adopting this "attitude" of judicial deference include the legislature's choice of the tribunal as the primary forum, the relative speed and economy with which it can dispose of matters and its possible expertise.[108] This attitude involves treating the tribunal's reasoning with respect, regardless of the subject matter of the reasoning, whether factual or legal, "by asking whether that reasoning *did in fact and also could in principle* justify the conclusion reached".[109]

Finally, the "principle" of deference as respect

> "is inherently democratic. It adopts the assumption that what justifies all public power is the ability of its incumbents to offer adequate reasons for the decisions which affect those subject to them. The difference between mere legal subjects and citizens is the democratic right of the latter to require an accounting for acts of public power."[110]

Dyzenhaus's model of deference is formulated within the Canadian context, which has a developed principle of judicial deference. Therefore, it is instructive to contextualise deference as respect properly and to this end Mullan has usefully considered the exportability of Canadian judicial deference in a critical analysis

[102] Dyzenhaus (n 97) 286.
[103] Dyzenhaus (n 97) 286.
[104] Dyzenhaus (n 97) 286 (emphasis added). Note that Dyzenhaus does not limit deference to the context of judicial pronouncements on administrative action.
[105] Dyzenhaus (n 97) 303.
[106] Dyzenhaus (n 97) 303.
[107] Dyzenhaus (n 97) 303.
[108] Dyzenhaus (n 97) 303-304.
[109] Dyzenhaus (n 97) 304 (emphasis added).
[110] Dyzenhaus (n 97) 305. See also 307.

of the principle.[111] Unfortunately, the South African courts have failed even to acknowledge the singular context of deference as respect, merely adopting it indiscriminately.

Mullan proffers the view that the origins and development[112] of judicial deference in Canada reveal "what in its detail is an indigenous system of judicial review, the precise parameters of which are unlikely to commend themselves to the courts of other jurisdictions".[113] There are common philosophical considerations at the foundation of Canadian judicial review, which may be of value to other jurisdictions, though.[114] For example, an increasingly plural legal reality demands respect for administrative agencies because such a legal context cannot accommodate courts as the supreme authority on all questions of law, fact and the interpretation of law. Nevertheless, Mullan notes that factors such as these cannot in themselves justify the Canadian version of judicial deference.[115] Deference must be justified by "a coherent conception of the proper constitutional role of the courts in relation to statutory and prerogative decision-making".[116] This reiterates Dyzenhaus's argument that deference is contingent on choices of legal political theory. It is only once these choices have been made and a particular conception of the rule of law adopted that deference can be explained and justified. Thus, the parameters and objectives of the administrative-law relationship are a function of political theory and the rule of law. Finally, Mullan indicates that Canadian deference has faced a barrage of criticism,[117] so that even their developed and contextual deference remains controversial.[118]

3.2 Deference and constitutional supremacy

Dennis Davis attempts to contextualise South African judicial review in the manner advocated by Dyzenhaus and Mullan.[119] With reference to Hunt, Davis says that "the central question of a system of administrative law, particularly when located within a constitutional dispensation, is 'what are the proper boundaries to the respective powers of different branches of government, and who decides on where those boundaries are drawn?'"[120] Deference supposedly provides answers to this question, but Davis holds that deference does not and cannot resolve such a question in the abstract. Preliminary concerns must be addressed before the content of deference can be determined.

[111] Mullan "Deference: is it useful outside Canada?" 2006 *Acta Juridica* 42. One should note that Mullan's article has now been overtaken by developments in Canadian law (see Daly *A Theory of Deference in Administrative Law: Basis, Application and Scope* (2012) 15-17), but, at the very least, it sets out the Canadian legal position at the time O'Regan J drew on Dyzenhaus's work.

[112] See Mullan (n 111) 55-56. It is noteworthy here that the attitude towards review assumed by the United States supreme court for scrutinising administrative agencies during the "New Deal" is foundational to Canadian judicial deference (56). This resonates with Dyzenhaus's assertion that judicial review can be given meaning only on a foundation of political and legal theory.

[113] Mullan (n 111) 56.

[114] Mullan (n 111) 57-58.

[115] Mullan (n 111) 58.

[116] Mullan (n 111) 58.

[117] Mullan (n 111) 51-55. Criticism of Canadian deference covers a wide spectrum: deference itself is unjustifiable; deference is not applied appropriately; deference should be intensified; etc.

[118] This is illustrated by the recent development of Canadian deference; see Daly (n 111) 15-17. However, Mullan's analysis remains relevant, because this is the deference to which Hoexter and O'Regan J alluded in citing Dyzenhaus.

[119] Davis "To defer and then when? Administrative law and constitutional democracy" 2006 *Acta Juridica* 23-41.

[120] Davis (n 119) 23 (footnote omitted).

Davis argues that the nature of administrative law must be reconciled with the relatively new legal context of human rights.[121] In line with Mullan, this statement in itself reveals a choice in political theory that assumes particular significance in a legal system of constitutional supremacy.[122] This leads to another question: how are courts to reconcile law and politics? Deference is a relatively recent response to this question.[123] Deference, however, merely leads to a further inquiry, namely, how do courts determine an appropriate standard of review in relation to the facts?[124]

Davis concludes that, as a matter of positive law, "the concept of deference which has earned such enthusiastic judicial mention has not been based on clear principle nor on a recognition that administrative law is now located within the context of a rights culture".[125] In other words, the justification for deference required by both Dyzenhaus and Mullan has not been satisfied in the South African context.[126] In the first place, according to Davis judicial review and administrative law in general have not been integrated in a rights culture and context as yet. This has implications for the very nature of administrative law and therefore, in this sense, administrative-law theory is out-dated. Secondly, on Mullan's interpretation, the constitutional role of the courts cannot be determined in isolation: the judiciary's function is also defined in relation to the functions of the other branches, which reiterates the importance of the relationship between the branches. Simply put, the judicial role is a function of the executive, administrative and legislative functions.[127]

3.3 Deference *per se*

As mentioned, Mullan indicates that Canadian deference has faced a barrage of critique: deference is unjustified, deference is not applied properly and deference should be intensified.[128] Thus, even the developed and contextual deference that has

[121] Davis (n 119) 25. The advent of human-rights law has resulted in a new dimension for judicial review and, by implication, deference that requires serious attention. Jowell states the significance of deference, in this context, powerfully: "the most difficult question for the courts in the interpretation of the Human Rights Act 1998 (HRA) is the extent to which they should defer to Parliament and other institutions of government on matters relating to the public interest" (Jowell "Judicial deference: servility, civility or institutional capacity" 2003 *Public Law* 592). See the discussion above on the *Pillay* case (n 84), which suggests that s 33 of the constitution might be applied in a unique manner.

[122] s 2 of the constitution.

[123] Davis (n 119) 25.

[124] Davis (n 119) 33.

[125] Davis (n 119) 39. Davis argues that, in South Africa, "a theory of deference fails to capture the positive, dialogic role that a court is required to play within the scheme of socio-economic rights", merely entails that courts defer to superior institutional competence in determining socio-economic policy, and "within the South African historical context … is far too closely aligned with the jurisprudence of apartheid to constitute a model for the transformation of the legal landscape" (Davis "Adjudicating the socio-economic rights in the South African constitution: towards 'deference lite'?" 2006 *SAJHR* 301 319-320 (footnote omitted)). See Davis on the different periods of legal development, (n 119) 24-25.

[126] As mentioned, Mullan argues that deference is justified by "a coherent conception of the proper constitutional role of the courts in relation to statutory and prerogative decision-making" (Mullan (n 111) 58) and Dyzenhaus argues that "the justification of review and guidance on how such review should proceed can only be found in a political theory of the rule of law" (De Ville (n 100) 43 (footnote omitted)).

[127] See Vile *Constitutionalism and the Separation of Powers* (1998) ch 13 on a separation of powers consisting of four branches and functions.

[128] Mullan (n 111) 51-55.

evolved in Canada is subject to criticism,[129] strongly suggesting that the adoption of any conception of deference should proceed with caution.

Arguably, Allan is deference's severest critic, questioning even the possibility of a theory of deference.[130] While Davis, for instance, asserts that deference in South Africa is not informed by the correct legal context, *ie* constitutional democracy and a human rights culture, Allan is sceptical of the very enterprise of judicial deference, arguing that "[t]here is no logical space for any free-standing *doctrine* of deference".[131] That Allan is sceptical of deference as a doctrine is quite clear and should be emphasised, since many of Allan's critics do not acknowledge this fundamental point.[132]

In relation to a specific case before the court, Allan says that the scope of judicial review and of administrative discretion cannot be determined or balanced in the abstract, without considering the applicable legal questions in all the circumstances.[133] In other words: "Insofar as talk of 'deference' promises to short-circuit such analysis, suggesting a direct linkage between deep-level constitutional theory and the resolution of particular rights-claims, it generates only confusion and misunderstanding."[134]

Allan characterises the factors which are indicative and supportive of a measure of due deference[135] as "plainly *external* to the intrinsic quality of the decision under review".[136] This is deeply problematic, because due deference requires of a court to evaluate the arguments before it in the light of the decision-maker's characteristics instead of those of the decision[137] and is tantamount to non-justiciability.[138] One should add that the court considers only one party's characteristics, a party to the proceedings with a direct interest in the outcome. In addition, deferring to administrative decision-makers on the basis of expertise or superior access to information compromises judicial independence and neutrality.[139] The external questions are distinguished from the "*internal* questions of expert judgement and procedural diligence, *as demonstrated in relation to the matter in issue*".[140] Anyhow, the criteria which make up a doctrine of deference are incorporated in "ordinary judicial procedures, which do not try to replicate ... decision-making

[129] The limitations of Canadian deference are also evinced by its recent modification: see Daly (n 111) 15-17.

[130] See Allan "Common law reason and the limits of judicial deference" in Dyzenhaus (ed) *The Unity of Public Law* (2004) 289-306; "Human rights and judicial review: a critique of 'due deference'" 2006 *Cambridge Law Journal* 671-695; "Deference, defiance, and doctrine: defining the limits of judicial review" 2010 *University of Toronto Law Journal* 41-59; "Judicial deference and judicial review: legal doctrine and legal theory" 2011 *Law Quarterly Review* 96-117.

[131] Allan (n 130 (2006)) 694. See Allan (n 130 (2004)) 305-306.

[132] Allan (n 130 (2011)) 97-100.

[133] Allan (n 130 (2006)) 676; (n 130 (2010)) 49. Regarding the primacy of context, see the *Bato Star* case (n 4) par 45; Mullan (n 111) 51. See also Jowell (n 121) 598-599, where he contends that, regarding institutional capacity, "there is no magic legal or other formula to identify the 'discretionary area of judgment' available to the reviewed body" (599) (footnote omitted).

[134] Allan (n 130 (2006)) 676.

[135] Such as the decision-maker's expertise or thorough procedures. See Allan (n 130 (2006)) 687-688.

[136] Allan (n 130 (2006)) 688. See Allan (n 130 (2010)) 51.

[137] Allan (n 130 (2006)) 688.

[138] Allan (n 130 (2006)) 689.

[139] Allan (n 130 (2004)) 289-290.

[140] Allan (n 130 (2010)) 59.

processes",[141] and in the distinction between appeal and review, which prevents judges substituting their own decisions for those of administrative decision-makers. Judicial review's emphasis on the context of the decision also incorporates these criteria.[142] The courts' main concern must be the reasons for the decision given the circumstances, in line with a "legal culture of justification".[143]

A further concern is that deference contributes to a misleading rhetoric of judicial restraint. Lenta explains that, in South Africa, "judicial decisions are punctuated by a rhetoric of restraint that is intended to allay concerns about the court's usurpation of political functions that fall properly within the domain of the legislature or the executive".[144] Nevertheless, the constitutional court is attacked from two sides.[145] On the one hand, when the constitutional court refrains from entering into the political realm it is criticised for not protecting socio-economic rights sufficiently. On the other hand, when it allegedly trespasses onto the functions of the legislature or executive it is accused of usurping their functions, which is undemocratic and, hence, illegitimate behaviour.[146] In other words, the constitutional court is simultaneously accused of both exercising too little and too much restraint. Courts, instead of articulating the constitutional foundation from which they intervene with administrative decisions and "sensing that they are on thinner constitutional ground in substantive review than on procedural review, do all they can to cover their tracks by laying false clues and donning elaborate camouflage",[147] such as the employment of a rhetoric of deference.

3.4 Deference, the separation of powers, and the question of a fourth branch

The strategy of "camouflage" is also apparent when the rhetoric of deference is contrasted with the separation of powers. Deference is often associated with the doctrine of separation of powers. Quite how deference or respect relates to the separation of powers is uncertain. O'Regan J says that deference flows from the separation of powers,[148] but what this means remains unresolved. O'Regan J does not explain how deference derives from the separation of powers, or whether the ideas of the separation of powers simply support deference. Is the idea of deference an aspect of the separation of powers? Does deference supplement the separation of powers? Or is deference merely congruent with the separation of powers? These distinctions are relevant because they affect the content of deference and the way content can be given to deference.

For instance, the notion of checks and balances is additional to the doctrine of separation of powers because it is not necessarily an aspect of the pure doctrine, but it relies on the existence of the doctrine.[149] Whereas the pure doctrine limits the power of any one branch, checks and balances ensure that the branches are directly answerable to one another. Thus, the idea of checks and balances modifies the pure

[141] Allan (n 130 (2006)) 692. See Allan (n 130 (2004)) 306; "What is really needed is a reminder that even a proportionality test need not (and generally should not) amount to the substitution of a judicial view for the public body's opinion on the merits" Allan (n 130 (2010)) 43.
[142] Allan (n 130 (2004)) 295, 297.
[143] Allan (n 130 (2006)) 694 (footnote omitted).
[144] Lenta "Judicial restraint and overreach" 2004 *SAJHR* 544.
[145] Lenta (n 144) 544-545.
[146] Lenta (n 144) 544-545.
[147] Jowell (n 99) 454.
[148] the *Bato Star* case (n 4) par 46.
[149] See Maree *Investigating an Alternative Administrative-Law System in South Africa* (2013 diss U Stell) 112.

doctrine and it complements the pure doctrine. In other words, conceptually the doctrine can exist without checks and balances, but the opposite is impossible. Likewise, the inquiry here is whether deference is an expression of the separation of powers itself, whether deference complements the doctrine, or whether deference merely relies on the separation of powers.

Apportioning functions to different branches in order to achieve certain normative objectives is precisely the concern of the separation of powers, even of the pure doctrine.[150] In terms of the pure doctrine, the judiciary is not permitted to encroach upon the executive function. Therefore, if deference merely "consists of a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies",[151] implies "recognising the proper role of the Executive within the constitution"[152] or "manifests the recognition that the law itself places certain administrative actions in the hands of the executive",[153] it is arguable that deference contributes nothing beyond the pure separation of powers.

Unlike the doctrine of the separation of powers, which addresses a wide range of political and legal relationships, deference focuses on, but is not limited to, the relationship between the public administration and the judiciary.[154] This focus can be useful especially where a fourfold classification of state branches and functions in terms of the separation of powers is not employed. The executive branch and function has limited analytical potential because of its dual nature, which comprises both policy formulation and the implementation of policy and legislation. The executive branch includes both the cabinet and the public administration, powerful and divergent organs of state. The singular nature of the administration and its significance demands constitutional recognition. The constitution, however, provides only for the executive authority which is vested in the president[155] and which the president exercises with the cabinet.[156] In the light of the case for a separation of powers that accommodates at least four branches of government[157] this is unfortunate, but not decisive. The constitution has been interpreted as providing a threefold distinction of government branches and functions.[158] On this interpretation the constitution does not reflect the rise and importance of the public administration in the regulatory state. However, the constitution can be read to require a threefold division of branches and functions as a minimum requirement. This is plausible considering the constitution's express recognition of the administration and its role.[159]

If a fourth branch is introduced for purposes of state power analysis and regulation, then deference is largely an aspect of the separation of powers. The fact that deference focuses on a particular relationship within the separation of powers, namely the relationship between the public administration, as part of the executive, and the judiciary, will be largely subsumed by the addition of a fourth branch.

[150] See Maree (n 149) 112.
[151] Hoexter (n 1) 501.
[152] *Bato Star* case (n 4) par 48.
[153] *Phambili Fisheries* case (n 34) par 50.
[154] at least in the case law. One does not find the same deference rhetoric in judgments dealing with the relationship between the judiciary and legislature, although the term (without more) is at times also used in that context.
[155] s 85(1) of the constitution.
[156] s 85(2) of the constitution.
[157] See Maree (n 149) 47-53.
[158] See *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) par 18-22.
[159] See s 195 of the constitution.

The fourth branch acknowledges that the public administration is distinguishable from the executive precisely because of its size and its role in performing day-to-day functions. The exponential growth of the public administration's mandate and impact justifies more analysis and more attention than under the traditional separation of powers. Nevertheless, deference can still make a valuable contribution by providing actual guidance on how to determine the competencies of the branches of government and the legitimate scope of checks and balances. Deference would serve to determine when scrutiny is appropriate, the standard or manner of scrutiny and how the court should intervene with administrative action.

If the threefold distinction of government branches and functions persists, then deference will have an even more valuable role to play. Under the threefold division, deference addresses the relationship between the public administration and the judiciary. Deference can play two roles: one, deference can draw attention to the importance of the public administration-judiciary relationship and, two, deference can serve as a gauge for when and how the judiciary should scrutinise administrative action and how it should intervene. Then it is a term that admits of the limits of the separation of powers, as presently understood in South Africa, and makes a contribution by providing guidance where the separation of powers is silent. For, although the separation of powers and checks and balances are concerned with the competencies of the branches of government, the separation of powers provides little guidance as to how competencies are determined, how they should be apportioned and how they should be balanced. This is where deference can contribute to the conceptual analysis of the relationship between the public administration and the judiciary.

3.5 A culture of justification and deference?

Dyzenhaus's central argument concerning deference is that courts must take administrative decisions seriously.[160] This amounts to a "new understanding of the deference principle", namely, "deference as respect" as opposed to "deference as submission".[161] What the serious consideration of administrative determinations entails requires elaboration. Firstly, Dyzenhaus argues that judges should give "independent weight" to the reasoning of administrative tribunals.[162] Secondly, this "acknowledgement" of administrative determinations nevertheless requires "the close judicial scrutiny of the tribunal's reasoning", which Dyzenhaus describes as a "curious feature".[163] Thirdly, such close consideration of administrative determinations raises the "paradox of rationality", but *close scrutiny and deference are compatible* where deference is understood as respect, as opposed to submission.[164] Finally, deference as respect changes the "interpretive context": rather than relying on a positivist understanding of the law, the meaning of a statute is determined by reference to the best reasons for having that statute.[165] Determining the meaning of a statute in this manner is a "reconstructive project" and the reasons may be "legislative, administrative or judicial".[166] According to Dyzenhaus, this

[160] Dyzenhaus (n 97) 303.
[161] Dyzenhaus (n 97) 302-303.
[162] Dyzenhaus (n 97) 302.
[163] Dyzenhaus (n 97) 302.
[164] Dyzenhaus (n 97) 302. This suggests that deference is not limited to determining the intensity of review, *cf* Daly (n 111) ch 4, nor does close scrutiny of the facts exclude deference.
[165] Dyzenhaus (n 97) 303.
[166] Dyzenhaus (n 97) 303.

change in the "interpretive context" makes a significant difference to a court's range of decisions.[167]

In addition to the implications of deference as respect, Dyzenhaus describes the nature of his conception of deference: "Deference as respect ... provides an ideal which can inform an attempt to rearticulate the relationship between the legislature, the courts and the administration in such a way that the courts retain a legitimate role as the ultimate authority on the interpretation of the law."[168] Significantly, deference as respect emphasises the relationship between the branches of state.[169] Therefore, Dyzenhaus does not merely try to identify the functional sphere of each branch[170] and exceptions to that sphere.[171] He goes further by pointing out that deference is concerned with the interaction between the branches and that this interaction can be shaped by deference. Although deference can inform the rearticulation of the relationship, deference does not necessarily constitute the rearticulation itself.[172] He also explains the rationale for this argument: factors such as the rule of law, equality and democracy affect the relationship and must inform the relationship.[173] Thus factors external but related to the separation of powers and checks and balances inform the relationship. This reinforces the argument in favour of evaluating the administration, as well as judicial review, as a component of an administrative-law system, rather than compartmentalising the branches and their functions as an end in itself. The wording in the preceding quotation ("can inform an attempt to rearticulate the relationship") also suggests that the "attempt" is yet to be made and that the role of deference, at this stage at least, is relatively modest as an informing ideal.

Thus, deference as respect is a guiding principle rather than a legal rule.[174] However, deference is limited to the extent that the judiciary remains the "ultimate authority on the interpretation of the law".[175] The status of the judiciary is thereby preserved, but the scope of legal argument is broadened and the manner of establishing that argument is modified.

Therefore, attempts to describe deference as equating administrative and judicial conclusions of the law are incongruent with Dyzenhaus's position. Likewise, arguments where courts are required only to cast a cursory glance over administrative determinations are also inconsistent with Dyzenhaus's position. The emphasis is rather on the value of administrative arguments, instead of the author of the argument. It is the judicial approach to administrative decisions, when operating in a vacuum, which is challenged: the emphasis is on which reasons are relevant and how courts should assess reasons, rather than the source of the reasons. The emphasis is on what constitutes valid legal argument, rather than treating

[167] Dyzenhaus (n 97) 303-304. Taking administrative determinations seriously, in the sense advocated by Dyzenhaus, reinforces both red-light and green-light theories of administrative law. On the one hand, administrative acts are scrutinised closely and the administration is required to justify its acts. This can be characterised as a form of control. On the other hand, the administration, as the branch specialised in administrative matters, is entitled to justify its actions with reference to the reasons that best justify the decision, even if those reasons are administrative or other reasons.

[168] Dyzenhaus (n 97) 303.

[169] Dyzenhaus argues that only deference as respect can "rearticulate the proper relationship between the legislature, administrative agencies and the courts" (n 97) 286.

[170] on the basis of the separation of powers or legislative authorisation.

[171] in the form of checks and balances, for instance.

[172] The South African courts seem to regard deference itself as the rearticulation of the relationship.

[173] Dyzenhaus (n 97) 303-305.

[174] Dyzenhaus (n 97) 286.

[175] Dyzenhaus (n 97) 303.

the administration leniently. Dyzenhaus advocates an integrated approach where democracy, the rule of law and equality play a role in forming judicial decision-making. Thus, the emphasis is on how courts treat administrative arguments, rather than on how courts treat the administration.

Dyzenhaus does not claim that his exposition of deference as such can provide answers in particular cases, on the scope of reasonableness, for instance. Decisions must be "supportable", not necessarily supported.[176] Where the administration is concerned, courts must determine whether a decision is "supportable by the reasons it [the administrative tribunal] in fact and could in principle have offered"[177] and "even if the reasons in fact given do not seem wholly adequate to support the decision, *the court must first seek to supplement them* before it seeks to subvert them".[178] Thus, where administrative decisions are before the court, the court goes to some length to determine whether the decisions are supportable or justifiable, but does not thereby evade close judicial scrutiny. The court plays a pro-active role.

On the whole, Dyzenhaus introduces a claim similar to Hoexter's:[179] they both discuss in broad terms what deference should be and why, rather than what deference implies in a particular case. Hoexter also regards Dyzenhaus's contribution in this light, referring to his "*exploration* of the *idea* of deference".[180] Nevertheless, in cases like the *Bato Star* case, deference is drawn upon in a manner that suggests Dyzenhaus and Hoexter formulated factors that are directly applicable to reasonableness review of administrative action. In doing so, the South African courts have misunderstood these writers, adopting their conceptions of deference erroneously.

Whether the judiciary can simply take administrative determinations of the law seriously from one day to the next is debatable. At least, it cannot be assumed that the judiciary has the capacity to effect such a change by the mere assumption of a new approach, other things being equal. Simply obliging judges to take these determinations "seriously" will not necessarily solve problems such as the scope of the judicial function or the tension between the judiciary and the administration. How are judges without any required training or experience in public administration, economics or political theory supposed to take these determinations seriously? Is it any different from expecting an administrator to judge a complex legal case? Taking administrative determinations seriously amounts to a change in legal culture, *ie* "a new imagination and self-reflection about legal method, analysis and reasoning";[181] this should extend to institutional innovation.

Dyzenhaus does not advocate taking the administrator's word at face value: rather, administrative and other justifications require recognition as legally legitimate justifications for certain decisions; and the courts are to play a constructive role in formulating such justifications. Administrative determinations form part of the context within which the legal validity of administrative decisions is assessed. This is the core of deference as respect, rather than avoiding engagement with administrative decisions or reserving functional spheres for other branches. This approach does not point in one direction or another when applied in the abstract, as

[176] Dyzenhaus (n 97) 304-305.

[177] Dyzenhaus (n 97) 305. Dyzenhaus reiterates this point: in the event of recourse to a court "that recourse must be on the basis of the question whether the tribunal's decision was supportable by the reasons it in fact and could in principle have offered" (305). See De Ville (n 100) 53: "Asking whether a decision is justifiable is also different from asking whether a decision is justified."

[178] Dyzenhaus (n 97) 304 (emphasis added).

[179] in her article, Hoexter (n 1).

[180] Hoexter (n 1) 501 n 79 (emphasis added).

[181] Klare "Legal culture and transformative constitutionalism" 1998 *SAJHR* 146 156.

would be the case where the seniority of the administrator plays a role regardless of the facts of a particular case.

Therefore, both Dyzenhaus and Hoexter call for a developed theory of deference, but do not claim to have formulated it. Instead, they describe the nature of the deference they have in mind. This is significant in the South African context in particular because their discussions have been employed as final claims about deference. In addition, deference as respect should be understood in the light of Mureinik's "culture of justification". Dyzenhaus says that the "idea of a legal culture of justification ... is of crucial importance to [his] own work".[182] He specifically acknowledges his debt to Mureinik[183] and explains that his "thesis depends on a theory which connects the value of equality with the rule of law through the idea of a legal culture of justification".[184] Considering the central role of the idea of a legal culture of justification, arguments suggesting that deference entails a superficial or arm's length approach to the administration seem misconstrued. Dyzenhaus underlines the importance of deference as a democratic principle:

> "[deference as respect] adopts the assumption that what justifies all public power is the ability of its incumbents to offer adequate reasons for the decisions which affect those subject to them. The difference between mere legal subjects and citizens is the democratic right of the latter to require an accounting for acts of public power.
>
> The legislature, the administration and the courts are then just strands in a web of public justification. The courts' special role is as an ultimate enforcement mechanism for such justification. When administrative tribunals make decisions on points of law, those subject to the decision are entitled to require that the tribunal should offer reasons that in fact justify the decision. Should they not be satisfied, recourse to the courts should be available. But that recourse must be on the basis of the question whether the tribunal's decision was supportable by the reasons it in fact and could in principle have offered."[185]

Allan also emphasises the role of a culture of justification as he argues against a doctrine of deference. It is perhaps surprising that he refers to Dyzenhaus with approval. Allan's central argument is that a freestanding doctrine of deference is not only undesirable, but virtually a theoretical impossibility.[186] He assesses the cogency specifically of a freestanding, independent doctrine or theory, which determines the scope of review and can limit the judiciary's control of the political branches regardless of the merits of the particular case.

He is adamant that factors external to the case at hand, which delineate the functional spheres of the branches of state, are inherent to the judicial review

[182] Dyzenhaus (n 97) 279; see De Ville (n 100) 41. Given the centrality of a culture of justification to administrative justice (see Corder "The development of administrative law in South Africa" in Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2015) 2), the judiciary's insistence that it is not well placed to ascertain complex, policy-laden or polycentric matters (but only when the administration is involved, it seems) does not bode well for the ordinary citizen's expectations to have the state truly justify its actions to its citizens. If the courts cannot even require the administration to account for its actions in detail, then the citizen acting outside of the court might well have to be satisfied with far less justification. If the judiciary can enforce rights only in a diluted fashion, the constitutional imperatives of legality, openness and transparency are compromised.

[183] Dyzenhaus (n 97) 279, 302 n 62.

[184] Dyzenhaus (n 97) 302 (footnote omitted).

[185] Dyzenhaus (n 97) 305.

[186] Allan (n 130 (2006)) 672, 675, 694. Allan certainly has critics, some of whom seem to qualify as detractors. For Allan's response to his critics see Allan (n 130 (2011)). Also see Daly (n 111) 26-35.

process[187] and so dependent on context that they have little, if any, meaning in the abstract. Citing Dyzenhaus, Allan argues that

> "[i]f the protection of individual rights is to be compatible with the exercise by public authorities of discretionary powers to act in furtherance of the general interest, there must be some division of competence between the legal and political branches of state. The courts must cede to Parliament and government an appropriate sphere of decision-making autonomy, protected from judicial interference. The boundaries of that sphere of autonomy, however, cannot be settled independently of all the circumstances of the particular case; for only the facts of the particular case can reveal the extent to which any individual right is implicated and the degree to which relevant public interests may justify the right's curtailment or qualification. The balance of judgment, as between judicial opinion and that of the legislature or public officials, will depend on the range of discretion applicable in all the circumstances: judges should 'defer' to the conclusions of other persons only to the extent that the reasons offered in support of those conclusions prove persuasive. There is, then, no means of defining the scope of judicial powers, or prescribing the limits of official discretion, as regards the details of any particular case, without examination of the specific legal issues arising in all the circumstances."[188]

Thus, Allan recognises a sphere of administrative autonomy.[189] He also recognises that factors, such as the relative expertise of the decision-maker, are relevant in the determination of constitutional boundaries. However, such factors have meaning only in relation to the particular facts of a case.[190]

It is noteworthy that Allan consistently refers to Dyzenhaus with approval,[191] since Dyzenhaus is generally cited as an advocate[192] of deference and Allan an opponent[193] of deference. Notably, Allan limits his critique to "an independent *theory* or *doctrine* of deference",[194] even though this does not necessarily explain Allan's reliance on Dyzenhaus. Allan's endorsement of Dyzenhaus's position, and by implication deference as respect, supports the reading of Dyzenhaus set out

[187] Allan (n 130 (2006)) 679-680, 694.
[188] Allan (n 130 (2006)) 676 (footnote omitted).
[189] Allan (n 130 (2006)) 673. In order to argue that administrative autonomy has been infringed upon by the judiciary, one would have to determine the content and scope of the administrative function. The administration has a constitutional mandate to perform an administrative function; therefore, the independence of the administration, in terms of the separation of powers, is limited to the performance of that function. Likewise, the judiciary is constrained by the separation of powers, as well as checks and balances, to remain separate, both institutionally and functionally, from the legislature and executive. In other words, the separation of powers protects the independence of the branches so far as their relative functions are concerned. The legislative function is protected from executive or judicial interference. Although the content of a particular function itself and the boundaries between the functions are difficult to determine, a branch is shielded from undue interference with its *own* function. When the administration strays into the executive sphere by formulating policy, for instance, the administration cannot rely even on its demonstrated expertise or its actually reasonable assessment of the information before it. Here, expertise in the administrative function itself is all that is relevant. Where the administration employs experts, such as economists or actuarial scientists, the administration does not thereby become an expert in economics or actuarial science, nor are those functions necessarily part of the administrative function. Though their findings may play a critical role, the administrative function relates to how that information is utilised in order to realise policy and implement legislation. Thus deference is only due to the administration in relation to the administrative function.
[190] Allan (n 130 (2006)) 690.
[191] See, for instance, Allan (n 130 (2006)) 676 n 16, 694 n 69; Allan (n 130 (2010)) 47, 54, 57.
[192] See, for instance, Taggart "Proportionality, deference, Wednesbury" 2008 *New Zealand Law Review* 423 455.
[193] See, for instance, De Ville (n 100) 41.
[194] Allan (n 130 (2006)) 672 (emphasis in original).

above. Thus, Dyzenhaus and Allan do not stand in opposition to one another and can be read as complementary.

Furthermore, Allan indicates that his critics do not seem to disagree with his contention that these factors are dependent on context.[195] However, if they were assessed in isolation from the facts, Allan contends that the judiciary would be compromising its independence, impartiality, neutrality and objectivity.[196] Where deference is employed as a separate enquiry, independently of the facts,[197] "[t]he effect is precisely the same as the application of a doctrine of non-justiciability".[198]

Allan's position can be read as congruent to an extent with the South African position in the *Bato Star* case.[199] O'Regan J makes it clear that institutional considerations cannot be decisive:[200]

> "Section 2 of the Act requires the decision-maker to *have regard to*[201] a range of factors which are to some extent in tension. It is clear from this that Parliament intended to confer a discretion upon the relevant decision-maker to make a decision in the light of all the relevant factors. That decision must strike a reasonable equilibrium between the different factors but the factors themselves are not determinative of any particular equilibrium. Which equilibrium is the best in the circumstances is left to the decision-maker. The Court's task is merely to determine whether the decision made is one which achieves a reasonable equilibrium *in the circumstances*."[202]

In the final analysis, Allan's rejection of factors operating in isolation from the facts, such as those identified by Hunt that include the decision-maker's "relative expertise" and democratic accountability,[203] is in line with Dyzenhaus's plea for courts to take administrative determinations seriously and to justify incidences of public power. Allan's position is also congruent with a culture of justification.[204]

4 *A decade and a half of deference, what next?*

4.1 Calling for a debate on deference, again

Evidently, the topic of deference characterises pronouncements on the relationship between the administration and the judiciary. In administrative-law review,

[195] Allan (n 130 (2011)) 3 n 15.
[196] Allan (n 130 (2011)) 116.
[197] The so-called "two-stage analysis", Allan (n 130 (2011)) 108.
[198] Allan (n 130 (2011)) 108.
[199] the *Bato Star* case (n 4) par 48-54.
[200] "A Court should ... give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker" the *Bato Star* case (n 4) par 48.
[201] emphasis in the original.
[202] the *Bato Star* case (n 4) par 49 (our emphasis).
[203] Allan (n 130 (2006)) 687.
[204] Allan (n 130 (2006)) 694.

deference has developed into the courts' main descriptor of this relationship,[205] and influential authors such as Dyzenhaus, Hoexter and Daly regard deference as pivotal to the development of a new, integrated approach to adjudication that reflects the role of the administration in the modern state.[206]

In South Africa, deference is derived from the functional spheres and characteristics of the branches of state, which are largely a separation-of-powers concern. Quite how deference differs from the ideas of the separation of powers is unclear, especially in South African case law, which all but equates the two. The prominence of deference reinforces the notion of a fourth branch within the separation of powers. Although the new terminology of deference might highlight a particular aspect of the separation of powers, deference as such can neither provide integrated solutions to problems associated with the relationship between the administration and judiciary nor describe its nature. Nevertheless, the courts raise deference without even acknowledging the nature of their respective functions.

Hoexter called for a debate on deference in the year 2000 for two reasons:[207] to determine an appropriate, integrated role for judicial review and to formulate a theory of intervention and non-intervention. This debate not only has yet to take place, it has hardly begun. As far as the South African courts are concerned deference amounts to nothing more than the broad strokes identified by Hoexter and, as applied, provides little more than the pure separation of powers.

Deference "flows" from the separation of powers according to the *Bato Star* case. However, despite the courts' apparent enthusiasm for a principle of deference, the actual role of deference is not only obscure, but seems merely to repeat the language of the pure separation of powers. This approach threatens to descend into a method characterised by formalism and conceptualism. Instead of grappling with questions such as the appropriate roles of the administration and the judiciary or the content of administrative justice,[208] courts invoke deference in a manner that suggests that the notion and its application are straightforward. On the basis of factors such as expertise, democratic legitimacy, seniority and complexity courts avoid substantive argument on the implications of the constitution for the judicial and administrative functions. Thus, deference as applied is largely empty. By relying on this "empty" version of deference courts evade engagement with principles and considerations that inform their function and relationship with the administration, including extra-legal considerations such as political theory. As a result, potential doctrinal and institutional innovations that the new constitutional dispensation may require are left unexplored. This is precisely what calls for a new legal culture have sought to avoid.

In our view, after a decade and a half of deference, we are no closer to formulating principles of intervention and non-intervention than when Hoexter first alerted us to the need for such development in South Africa. As a first step in response to this position, it is necessary to reiterate Hoexter's call for a debate. This debate does not take place in a vacuum; deference is not self-explanatory. Therefore, the context and conceptual framework within which the deference debate is to take place is sketched below. Without expanding on the principles and factors which are foundational to deference, the content of deference cannot be ascertained.

[205] the *Logbro* case (n 26) par 21-22; the *Phambili Fisheries* case (n 34) par 50; the *Bato Star* case (n 4) par 48.
[206] See Dyzenhaus (n 97); Hoexter (n 1); Daly (n 111).
[207] See Hoexter (n 1).
[208] See Klaaren "Redlight, greenlight" 1999 *SAJHR* 209-217.

4.2 An integrated function for judicial review

A point of departure in this debate must be the development of an integrated function for judicial review as called for by Hoexter. This entails that judicial review is one of a variety of methods to safeguard the right to administrative justice.[209] The Promotion of Administrative Justice Act supports this approach by establishing judicial review as a complementary mechanism in the pursuit of administrative justice. Section 7 of the act obliges the courts to require applicants to exhaust internal remedies before applying for judicial review: "no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted".[210] An integrated role for judicial review is necessitated by the high cost, long duration and formal procedures of litigation. Litigation also has a narrow focus on the dispute between the parties and courts are limited to the arguments presented by the parties.

Therefore, other forms of effective promotion of administrative justice must be investigated as part of the deference debate. This includes both potential and existing forms of promoting administrative justice. If judicial review is integrated, in actual fact, then deference is a function of the administrative-law system as a whole, in the sense that where protection increases within the administration or elsewhere, judicial review will arguably be informed by such a development. However, if the administrative-law system has not adapted to protect the interests of private individuals in ways other than judicial review, then the courts cannot take a back seat. Potentially, where the administration fails to reflect the constitutional vision of administrative justice, judicial review could retain its prominence. In this view, judicial intervention or non-intervention turns on the extent to which administrative justice is achieved by the administrative process as a whole. This approach may be aligned with O'Regan J's statements in the *Bato Star* case regarding the need, on the one hand, to treat administrative choices with "the appropriate respect", and, on the other, to retain judicial oversight of the reasonableness of the decision.[211] The court's assessment of the reasonableness *in law* of the impugned administrative action will determine whether such action complies with the constraints of administrative justice, which will inform the court's approach to intervention or non-intervention in the case.

By considering the administrative-law system as a whole, attention is drawn to the role of judicial review within the system as one form of control among others. This emphasises the value of the concept of the administrative-law system as well as the relationship as a conceptual tool for analysis and comparison. Considering jurisdictional control, *ie* legal control of administrative acts, provides a far clearer picture of the protection available than simply discussing the judiciary's role in isolation. Thus, an integrated principle of deference should take stock of the system as a whole and not merely of the role of the judiciary in a vacuum.[212]

4.3 Constitutional context

The concept of deference is yet to be contextualised in South Africa, particularly within our human-rights context.[213] Dyzenhaus's conception of deference as respect

[209] See Quinot "Regulating administrative action" in Quinot (n 182) 95-97.
[210] s 7(2)(*a*) of PAJA.
[211] the *Bato Star* case (n 4) par 48.
[212] S 7(2) of PAJA can support such an approach to administrative justice.
[213] See Davis (n 119) 39.

is informed by the Canadian constitution and principles such as the rule of law and equality as understood in the Canadian context. Thus, deference as respect, as conceived by Dyzenhaus, is an "indigenous" theory, to use Mullan's wording; it is integrated within the Canadian system.

Such a process of integration is yet to take place in South Africa. An appropriate theory of deference requires an assessment of deference in relation to considerations such as constitutional supremacy, Mureinik's culture of justification, Klare's transformative constitutionalism, and South Africa's human rights culture. These considerations are integral to a South African understanding of deference, whatever it may turn out to be, especially given the primacy of equality and democracy in the constitution.[214] The exercise of linking the rule of law and equality to deference, as understood by Dyzenhaus, must be replicated in the South African context. Deference as respect cannot simply be imported uncritically. Constitutional supremacy implies that the separation of powers, and by implication deference, must be informed by the content of administrative justice; it is not for an undeveloped "theory" of deference to determine the scope of administrative justice. Therefore an essential component of the debate must be the content of administrative justice and the minimum protection it provides.

Within the distinct South African constitutional context it is also essential to assess the link between deference and the developing doctrine of legality.[215] It may be that the relationship between administrative justice and legality is a function of a theory of deference. That is, the way in which courts decide to subject executive action (viewed broadly within the traditional tripartite division of the separation of powers) either to administrative justice requirements or to (lesser) legality requirements may flow from a theory of deference. Here deference influences both questions of justiciability (to what extent is the action at issue subject to judicial scrutiny?) and questions of standard of review (what does reasonableness review entail in this particular case?).

The link between legality and deference is borne out by the remarks of the majority in *Masetlha v President of the Republic of South Africa*[216] *where the court stated:*

> "It would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action. These powers to appoint and to dismiss are conferred specially upon the President for the effective business of government and, in this particular case, for the effective pursuit of national security. In *Premier, Mpumalanga* [*Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC); 1999 2 BCLR 151 (CC)], this court has had occasion to express itself on whether to impose a requirement of procedural fairness in the following terms:
> 'In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly' [the *Premier, Mpumalanga* case par 41]."

[214] Again the connections between political theory, context, institutional arrangements and particular rules are apparent.

[215] On the development of legality in relation to administrative justice, see Hoexter "The enforcement of an official promise: form, substance and the constitutional court" 2015 *SALJ* 207 219-223.

[216] 2008 1 SA 566 (CC) par 77.

This quotation illustrates a simultaneous concern with respect for the executive function (*ie* deference) and the appropriate basis and standard upon which to review the action (*ie* legality versus administrative justice).

4.4 Respect for administrative determinations of the law or cogency of reasoning

Dyzenhaus's entreaty to take administrative determinations of the law seriously requires further examination. First of all, what are administrative determinations? Secondly, what are the implications of constitutional supremacy and section 172 of the constitution for Dyzenhaus's contention that courts remain the ultimate authority on legal interpretation? Thirdly, what is the relationship between administrative action, as defined by the Promotion of Administrative Justice Act, and administrative determinations of the law? Finally, taking administrative determinations seriously requires at least the capacity to do so. Courts often point out that they are not well placed to consider polycentric issues. How are courts to take administrative determinations seriously if they are unqualified to do so?

4.5 Deference as a free-standing principle or informing principle or both

The extent to which deference is already part of the law should be acknowledged. The distinction between appeal and review is a form of respect towards the administrative function. The definition of "administrative action"[217] also limits the application of administrative law and thereby the purview of the courts, although this may be sidestepped in certain circumstances by relying on the constitutional principle of legality.[218] The development of legality review is thus a key consideration in the deference debate as outlined above. The variable standard of review, which excludes correctness or the substitution of the court's view for the administration's, also respects the administration. Section 6(2)(*f*)(ii) of the Promotion of Administrative Justice Act provides for a rationality test, and section 6(2)(*h*) provides for the general reasonableness test. Even though the latter does allow for proportionality[219] this standard maintains the distinction between appeal and review.

The remedies available to the courts are also limited. Section 38 of the constitution authorises the courts to "grant appropriate relief" where "a right in the Bill of Rights has been infringed or threatened". Section 172 authorises the courts to "make any order that is just and equitable". Similarly, section 8(1) of the Promotion of Administrative Justice Act provides that the courts "may grant any order that is just and equitable". Seemingly these provisions grant wide and far-reaching powers to the courts. However, only in "exceptional cases" may the court replace or change the administrative decision or order the administration to pay compensation.[220] The scope of remedies reflects the distinction between appeal and review and is also an incidence of grounds of review or of just and equitable remedies. In this context deference is not a free-standing legal rule that can be invoked by courts to justify a particular outcome in the case. The role of deference is to inform the development of specific legal rules, for example in the form of grounds of review or of just and equitable remedies.

The question regarding the particular role of deference vis-à-vis rules of positive law leads to the further inquiry "when does deference apply?" At this stage it

[217] s 1 of PAJA.
[218] However, this strategy also is limited.
[219] See Kidd "Reasonableness" in Quinot (n 182) 180-184, 190-191.
[220] s 8(1)(*c*)(ii)(*aa*) and (*bb*).

seems that deference permeates the entire legal landscape, from the allocation of constitutional competences to the application of particular rules and the formulation of remedies. Deference plays a role in the determination of justiciability, *eg* the definition of administration action;[221] deference determines the type of scrutiny available to the courts, *ie* review instead of appeal; deference determines the standard of review, *ie* rationality, reasonableness or proportionality, or even legality; and the scope of remedies is influenced by deference. Deference also influences the interpretation of legislation,[222] and deference is constituted by factors external to the facts of the particular case such as expertise, complexity, democratic legitimacy and discretion.[223]

4.6 Deference and the separation of powers

The link between deference and the separation of powers is problematic if not questionable. As we have seen, O'Regan J expressly links deference to the separation of powers in the *Bato Star* case, relying inter alia on Lord Hoffmann's opinion in the *ProLife Alliance* case. However, Lord Hoffmann's position is not that deference is underpinned by the separation of powers, as suggested by O'Regan J, but that deference is empty in the sense that the allocation of functions by the courts is nothing more than a legal question in terms of the separation of powers and the rule of law. In addition, Dyzenhaus and Daly do not support the emphasis on the separation of powers.

Daly points out that "developing general principles of judicial review from the separation of power is a difficult task".[224] He nevertheless

> "explore[s] four lines of reasoning which might lead to the conclusion that the separation of powers can compel the adoption of a doctrine of curial deference. Each line of reasoning will be rejected in turn, but they are not to be dismissed out of hand: each contains a seed of truth which will flourish under different conditions."[225]

The four lines of reasoning are checks and balances, curial deference as discipline, automatic deference and curial deference as enhancing the legislature's power.[226] In the final analysis, Daly states that "the tripartite division tells us little or nothing about the functions that are properly assigned to each branch".[227] This is even more so with political organs and functions that have developed more recently, such as the administration. Instead, Daly's theory of deference is founded on the delegation of powers to the administration by the legislature and "practical justifications" for deference.[228] For Dyzenhaus a theory of deference is based on democratic principles, the rule of law understood as equality and a "culture of justification".[229] The act of delegation will carry less weight in a system of constitutional supremacy than of parliamentary sovereignty, and practical justifications must be identified in context.

We do not attempt to argue that the separation of powers should be disregarded in relation to deference. Rather, the separation of powers, as such and without

[221] s 1 of PAJA.
[222] See Daly (n 111) ch 2.
[223] See Daly (n 111) ch 3.
[224] Daly (n 111) 44-45.
[225] Daly (n 111) 45.
[226] Daly (n 111) 45-48.
[227] Daly (n 111) 44.
[228] Daly (n 111) 5, ch 2, ch 3.
[229] Dyzenhaus (n 97) 302-305.

more, does not and cannot give content to a fully-fledged theory of deference. The separation of powers certainly informs deference. However, as illustrated by Dyzenhaus and Daly, the normative objectives that shape the separation of powers are more relevant to deference than the pure doctrine or *trias politica*. This emphasises the interrelatedness between political theory, context and the administrative-law system, which serves as the foundation of the deference debate.

5 *Conclusion*

Thus, deference seems to be quite undeveloped in the South African context. Even where deference has a long history and established role, in Canada for example, deference as such is contested and critiqued. However, on a close reading of Hoexter, Dyzenhaus and Allan there is significant potential for a principle of deference. Without compromising on a "culture of justification" and context, deference can make at least three vital contributions. Firstly, deference can emphasise and embody the distinct relationship between the administration and the judiciary within the separation of powers paradigm.[230] Secondly, on Dyzenhaus's interpretation, deference implies that courts should take administrative determinations of the law seriously. This involves a change in legal culture and, arguably, institutional innovation. Above all, it requires an appreciation of the administration and the administrative function and the capacity to do so. Finally, deference can facilitate a discussion on the appropriate role for judicial review within the administrative-law system, as proposed by Hoexter in 2000. We reiterate that this is a discussion that is yet to take place, despite the enthusiasm of the South African courts for a rhetoric of deference.

SAMEVATTING

ANDERHALF DEKADE VAN GEREGTELIKE RESPEK

Sedert die publikasie van Hoexter se artikel in 2000 oor die toekoms van geregtelike hersiening van administratiewe handelinge, het Suid-Afrikaanse howe 'n retoriek van geregtelike respek met groot entoesiasme aangegryp in administratiefregtelike beregting. In toonaangewende uitsprake soos die *Logbro*-, die *Bato Star*- en die *Foodcorp*-sake het die hoër howe hul onderskeie uitsprake bereik met 'n uitdruklike verwysing na "geregtelike respek" in die betrokke gevalle. Die outeurs argumenteer egter dat Hoexter nooit ten doel gehad het om 'n volledig ontwikkelde leerstuk van geregtelike respek bekend te stel nie ten spyte van die howe se aanvaarding van haar "definisie" van geregtelike respek ("deference"). In teendeel, Hoexter het 'n beroep gedoen om 'n *debat* oor geregtelike respek. Sy het aan die hand gedoen dat die drasties gewysigde staatsregtelike bestel waarbinne geregtelike hersiening van administratiewe handelinge in Suid-Afrika nou plaasvind onder die Grondwet van die Republiek van Suid-Afrika, 1996 'n heroorweging van die howe se rol *vis-à-vis* die administrasie in terme van die administratiefreg noodsaak. Nietemin het die grondwetlike hof in die *Bato Star*-saak Hoexter se idee van geregtelike respek toegepas asof dit 'n gevestigde regsbeginsel was en het die hof die terminologie van "deference as respect" aanvaar, met verwysing na Dyzenhaus se werk.

Die outeurs staan anderhalf dekade later weer stil by Hoexter se 2000-artikel en doen 'n bestekopname van die ontwikkeling van geregtelike respek. Hierdie bydrae bied 'n noukeurige analise van Hoexter se artikel en van die hofuitsprake wat Hoexter se omskrywing van geregtelike respek oënskynlik aangeneem het. Op grond van hierdie ontleding bied die outeurs 'n interpretasie van Hoexter se oogmerke en vergelyk dit met die daaropvolgende reaksie op haar werk, veral deur die

[230] To an extent this is already the case, since the courts do not employ the rhetoric of deference to describe the expertise of the judiciary or the other branches of state and the respect their decisions and reasons should be accorded. If deference flowed from the separation of powers as a general principle one would expect the principle of deference to be equally valid between all branches of state.

howe. Die outeurs kom na aanleiding van die ontleding tot die gevolgtrekking dat daar 'n kortsluiting bestaan tussen Hoexter se voorstel en die howe se hantering daarvan. Terwyl Hoexter op die behoefte aan ontwikkeling van 'n Suid-Afrikaanse opvatting van geregtelike respek gewys het, suggereer die howe se retoriek oor geregtelike respek dat daardie ontwikkeling reeds plaasgevind het.

Die outeurs analiseer vervolgens 'n aantal ander skrywers se werk oor geregtelike respek en veral die oënskynlike oorsprong van die begrip in die Kanadese konteks waar Dyzenhaus die denkbeeld van "deference as respect" ontwikkel het. Teen die agtergrond van hierdie breër analise bied die outeurs hul interpretasie van die grondwetlike hof se omgang met die begrip "respek". Hulle kom tot die gevolgtrekking dat na anderhalf dekade is die Suid-Afrikaanse reg nog niks nader aan die formulering van beginsels van inmenging en nie-inmenging deur die howe as toe Hoexter oorspronklik gewys het op die behoefte aan sodanige beginsels nie. Die gepaste reaksie is om Hoexter se versugting vir 'n indringende debat oor die onderwerp te herhaal.

LEGAL CERTAINTY HAS PRIORITY BEFORE THE INDIVIDUAL JUDGE'S MORAL BELIEFS

"Does this mean that in the context of pure economic loss the imposition of liability will depend on what every individual judge regards as fair and reasonable? I believe the answer to the last two questions must be 'no'. Liability cannot depend on the idiosyncratic views of an individual judge. That would cloud the outcome of every case in uncertainty. In matters of contract, for example, this court has turned its face against the notion that judges can refuse to enforce a contractual provision purely on the basis that it offends their personal sense of fairness and equity. Because, so it was said, that notion will give rise to legal and commercial uncertainty (see eg *Brisley v Drotsky* 2002 4 SA 1 (SCA) (2002 12 BCLR 1229) par 21-25; *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) (2004 4 All SA 168) par 27). I can see no reason why the same principle should not apply with equal force in matters of delict. A legal system in which the outcome of litigation cannot be predicted with some measure of certainty would fail in its purpose" – *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) 158D-F.